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No. 91-2003

In The

Supreme Court of the United States

October Term, 1992

UNITED STATES OF AMERICA

Petitioner,

v.

STATE OF CALIFORNIA AND
CALIFORNIA STATE BOARD OF EQUALIZATION

Respondents.

**On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

BRIEF FOR THE STATES OF ARIZONA, ARKANSAS, CONNECTICUT, FLORIDA, HAWAII, ILLINOIS, IOWA, LOUISIANA, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW YORK, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, TENNESSEE, TEXAS, VERMONT, VIRGINIA, WYOMING and THE STATE OF NEW MEXICO AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF FOR THE STATES OF NEW MEXICO, *et al.*, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF AMICI CURIAE

The States of New Mexico, *et al.*, file this brief as *amici curiae* in support of Respondent and urge the affirmance of the decision below. *Amici* States each year entertain considerable federal contractor activity resulting in substantial tax payments by these contractors to the States. From time to time disputes arise between contractors and state tax agencies over the amount of tax due. The contractors then have the same rights to protest

assessments of tax and the same period of time in which to seek refunds of tax as all other taxpayers.

This Court's decisions in *James B. Beam Distilling Co. v. Georgia*, 111 S.Ct. 2439 (1991); *American Trucking Association v. Smith*, 496 U.S. 167 (1990); *McKesson Corp. v. Division of Alcoholic Beverage and Tobacco Division*, 496 U.S. 18 (1990); and *Davis v. Michigan*, 489 U.S. 803 (1989), have graphically brought home to States the degree to which their treasuries are exposed to unexpected, retroactive depletion by tax refunds when widely adopted taxing schemes are declared invalid. *See Harper v. Virginia Department of Taxation*, (U.S. Sup. Ct. No. 91-794). The authority of States to define refund procedures and "enforc[e] relatively short statutes of limitation applicable to refund actions" remains a crucial "procedural protection against any disruptive effects of a tax scheme's invalidation." *McKesson*, 496 U.S. at 50. In setting the refund period, States are able to limit likely exposure to refund claims and balance the need to protect revenues collected for public expenditures against the opportunity for taxpayers to correct mistakes.

The Federal Government here proposes to remove that protection and to undermine State control over refund processes with regard to its contractors and presumably others with whom the Government deals. Rather than accepting the sovereignty of the several States to adopt refund procedures and set statutes of limitation, the Government is proposing a special refund period of six years under 28 U.S.C. § 2415 for federal contractors and presumably for all other taxpayers who are reimbursed by the Federal Government for tax payments. This unequal treatment of an undefined group of taxpayers with regard to taxes on federally-funded projects will make it substantially more difficult for States to predict potential liabilities, plan their budgets and ensure their financial integrity.

While the uncertainty which would result from the Government's proposal would be devastating to States' financial planning, the magnitude of the financial imposition on States is harder to assess. Were the Government and its contractors always to act efficiently and timely, perhaps no additional financial burden would be imposed since tax refunds would presumably be sought within the state statutory periods. But were the Government able to ignore state statutory procedures and, for whatever reason, file long-delayed refund claims, States would be subjected to considerable additional unpredictable liability. States would never know when funds from this year's budget will have to be diverted from the current government services for which they were appropriated to pay refunds of taxes collected over a half decade ago. *Amici* urge this Court to prevent such infringement on state sovereignty and budgetary processes.

SUMMARY OF ARGUMENT

The issue presented by the Government's petition is not whether the federal contractor, and through reimbursement obligation the United States, are entitled to relief from a tax imposed on the contractor under an asserted misinterpretation of California law. Of course the contractor and the United States as its subrogee are entitled to relief, if the state tax law was erroneously interpreted.

The issue is whether our federal system accords sufficient respect to state sovereignty to require that the proper interpretation of state tax law applied to federal contractors be litigated in state courts under state procedures. Since the Supremacy Clause has long been interpreted to permit States sufficient sovereignty under our federal system to impose state tax on federal contractors, *James v. Dravo Construction Co.*, 302 U.S.

134 (1937); *United States v. New Mexico*, 455 U.S. 720 (1982), one would certainly expect that States can impose state tax *procedures* on them.

This case does not involve tax liability imposed on the United States or its instrumentalities. In such case, an argument could be made that the Federal Government should be entitled to litigate its own liability in its own courts. But rather here we are concerned with the authority of States to provide adequate state procedures to determine the tax liability of independent federal contractors under state law. No cogent precedent exists to permit the Government to assert an arcane federal common law action for *indebitatus assumpsit* on behalf of its contractor in an era when state law provides plain, speedy and efficient remedies, including refunds, for illegally imposed tax.

This Court has repeatedly held that matters of state taxation are so important to the sovereignty and existence of state governments that great deference must be paid to state tax procedures. Even when the validity of a state tax under the United States Constitution is challenged, this Court has restrained federal courts from ruling until the state tax process has had a chance to correct the error. The Tax Injunction Act, 28 U.S.C. § 1341, bars federal courts from enjoining state tax programs. Comity bars federal courts from litigating both declaratory judgments in state tax matters and civil rights actions for damages (tax refunds) under 42 U.S.C. § 1983 if the States provide plain, speedy and adequate remedial procedures.

The Government here instructed its contractor to abandon litigation of its tax liability in California courts. Then the Government, itself, brought this untimely action in federal court. It brought suit after the expiration of the state statute of limitations not because of some neglect, inadvertence or error, but intentionally, perhaps to find a more hospitable forum. It

has not so far, and this Court should equally support the States' sovereignty to control their own tax procedures with regard to federal contractors.

ARGUMENT

The United States argues that it should be permitted to bring an untimely tax refund suit several years beyond the state statute of limitations seeking to recover taxes paid, not by itself, but by its contractor. The claim for refund is not based on any constitutional infirmity in the tax but on the alleged misapplication of state law to the contractor. Apparently realizing that this Court does not sit to interpret state law, the Government suggests as the basis for its suit an arcane federal common law cause of action for money had and received (*indebitatus assumpsit*), extended to tax matters many, many years ago[1] before the enactment of statutory procedures for obtaining tax refunds. The Government further argues that it should be allowed to ignore California tax procedures after having specifically directed its contractor to settle a portion of the contractor's timely state refund action and to dismiss without prejudice the balance of the claim.[2] The Government had one bite out of the apple by directing the California refund litigation. Now it seeks a second bite under "federal common law." This Court ought not permit such brazen forum shopping and disrespect for state tax proceedings.

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[1] *Elliot v. Swartwout*, 35 U.S. (10 Pet.) 137 (1836); *City of Philadelphia v. Collector*, 72 U.S. (5 Wall.) 720 (1866).

[2] The Government's contractor Williams Brother Engineering Company (WBEC) was obligated to keep the Government closely advised of the litigation with the California Board of Equalization. Joint Appendix, pp. 131-132. During the negotiations for settlement, counsel for WBEC made clear that the Government was the ultimate decision maker. Joint Appendix, pp. 94-97.

I. THE CONTRACTOR, NOT THE GOVERNMENT, IS THE TAXPAYER WHOSE REFUND IS AT ISSUE; THE GOVERNMENT IS SUING ONLY AS A SUBROGEE.

In the case at bar, the Government had no liability for the tax paid to California. The Ninth Circuit below specifically discussed this issue of sovereign immunity to assure itself that the California tax was "not imposed directly on the United States, or on a constituent part or instrumentality of the United States," which would have violated the intergovernmental immunity doctrine. 932 F.2d at 1348. The Ninth Circuit correctly concluded that this case is indistinguishable from *United States v. New Mexico*. Here, as there, the federal contractor, WBEC, was liable for and paid the tax. The only liability the Government has is its contractual obligation to reimburse WBEC for its expenses, including tax liability, which this Court held in *United States v. New Mexico* is "constitutionally irrelevant." 455 U.S. at 734-735.[3]

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[3] The Government argues it would be at the mercy of negligent and unconcerned contractors who cannot be relied upon to make timely claims for refund. (Br. 16-17). To the contrary, the Government can easily protect itself, by contract, from having to reimburse contractors for taxes that were not, in fact, owing. See Judge Wellford's dissent in *United States v. Benton*, 975 F.2d 511, 516 (8th Cir. 1992), in which he quotes, with the added emphasis, from the contract there at issue:

> (b) The following types of costs are *not* allowable:
>
> * * * * *
>
> (3) *taxes from which exemptions are available to the contractor directly*. . . . The term *Exemption* means freedom from taxation in whole or in part and includes a tax abatement or reduction resulting from mode of assessment, method of calculation or otherwise.

The Judge then concludes:

> It is important to distinguish this case from those where the Government, itself, is the taxpayer, and where the basis for the challenge to the state taxes is constitutional. The cases relied upon by the Government, particularly *United States v. Broward County, Florida*, 901 F.2d 1005 (11th Cir. 1990); *United States v. State of Michigan*, 851 F.2d 803 (6th Cir. 1988); *United States v. DeKalb County*, 729 F.2d 738 (11th Cir. 1984); *City of New Orleans v. United States*, 371 F.2d 21 (5th Cir. 1967); and *United States v. Independent School District No. 1*, 209 F.2d 578 (10th Cir. 1954), all concerned situations where the Government's own liability was at issue, not the liability of its contractor.
>
> In *United States v. Independent School District No. 1*, the Federal Government sued to obtain excess money it paid to the school district under the community school lunch program. In *City of New Orleans v. United States*, the Federal Government sued the City for a tax refund after the Louisiana Supreme Court had twice ruled that the Government, not Chrysler its contractor, was the owner of the property subjected to tax and, therefore, the relevant taxpayer. In *United States v. State of Michigan*, the Government sued for a refund on behalf of its instrumentality, a federal credit union. The Sixth Circuit noted "[h]ad we found that federal credit unions were not federal instrumentalities entitled to constitutional immunity from state taxation, this argument [that the state statute of limitations should control] would have been attractive." 851 F.2d at 810. In *United States v. DeKalb County* and *United States v.*

> Therefore, assuming that Olin initially was exempt from paying the taxes at issue as the government now contends, such taxes *paid by Olin* to the State of Missouri were *not* reimbursable or "allowable" costs under the contract.

Id., (emphasis in original, footnote omitted).

Broward County, Florida, the Government was the owner of the real property and the taxpayer under the Public Buildings Purchase Contract Act of 1954, 40 U.S.C. § 356, and the Public Buildings Amendments Act of 1972, 40 U.S.C. § 602, respectively. These two Acts subjected the Government to state and local taxes on property it has purchased under the financing arrangements established in those Acts.

Here, there is no question that the state taxpayer was WBEC, the federal contractor. The Government's authorities, therefore, are not pertinent.

II. RECOGNIZING THAT STATE TAXATION LIES AT THE HEART OF STATE SOVEREIGNTY, THIS COURT HAS REPEATEDLY DEFERRED TO STATE TAX PROCEDURES IN A WIDE VARIETY OF CASES.

Allowing the Federal Government intentionally to bypass state tax procedures, as it proposes here, conflicts with the unique deference this Court has shown toward state tax procedures in several contexts. That deference's based on the fundamental nature of the federal system and should inform the Court's decision here.

A. Under the Tax Injunction Act, States are Protected from Federal Court Injunctions Interfering with State Tax Programs so long as the States Provide Plain, Speedy and Efficient Remedies for the Taxpayer.

The Tax Injunction Act, 28 U.S.C. § 1341, provides:

> The district courts shall not enjoin, suspend or restrict the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

The Act codifies long-standing precedent from this Court that equity powers of the federal court will not be invoked "if the remedy at law is plain, adequate and complete." *Matthews v. Rodgers*, 284 U.S. 521, 526 (1932); *Singer Sewing Machine Co. v. Benedict*, 229 U.S. 481 (1913); *Boise Artesian Hot and Cold Water Co. v. Boise City*, 213 U.S. 276 (1909). No question has been raised in this case about the adequacy, speed or efficiency of the remedy offered by the California courts. The Government's contractor was fully engaged in California's statutory tax refund litigation when the Government directed the contractor to dismiss those actions in January 1988, just four months before bring this suit in May 1988.

The Tax Injunction Act does not apply to the United States. *Department of Employment v. United States*, 385 U.S. 355, 358 (1966) ("§ 1341 does not act as a restriction upon suits by the United States to protect *itself and its instrumentalities* from unconstitutional state enactments.") (Emphasis added.) But it is not the United States whose tax liability is at issue herein. WBEC is a federal contractor, not a federal instrumentality. The vital distinction between Government instrumentalities and Government contractors remains fundamental and unquestioned in the state tax area. *United States v. New Mexico*.

The policies underlying the Tax Injunction Act have extended deference to state tax procedures to other remedies in addition to injunctions.

B. Federal Courts will not Entertain Declaratory Judgment Actions Challenging the Validity of State Tax Statutes.

In *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943), this Court held that federal courts should not displace adequate state procedures to grant taxpayers relief by way of declaratory judgment. Citing the same equitable considerations that prompted the Court in *Boise Artesian* and its progeny to refuse to grant injunctions when "plain, adequate and complete" relief was available from the state, the Court in *Great Lakes* ruled

> [I]t is the court's duty to withhold such relief [by declaratory judgment] when, as in the present case, it appears that the state legislature has provided that on payment of any challenged tax to the appropriate state officer, the taxpayer may maintain a suit to recover it back. . . . This affords an adequate remedy to the taxpayer, and at the same time leaves undisturbed the state's administration of its taxes.

Great Lakes, 319 U.S. at 300-301. The Court so ruled even though the Federal Declaratory Judgment Act (Act of June 14, 1934, 48 Stat. 955) provided a legal as well as an equitable action for declaratory judgment. Retraint was thus based on more than equitable principles. It was based on the very nature of the federal system and the concomitant respect for state sovereignty.

C. Under the Principle of Comity Derived from the Fundamental Nature of Our Federal System, this Court Requires the Exhaustion of State Remedies Before Permitting Civil Rights Actions to be

Brought in Federal Court under 42 U.S.C. § 1983 to Challenge the Constitutionality of State Taxes.

In *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981), this Court held "that taxpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts." *Id.* at 116. The Court required the exhaustion of state remedies before permitting federal courts to entertain a federal civil rights action for damages, *i.e.*, a refund of the taxes paid, based on a constitutional defect in the state tax. This deference to state tax procedures derived entirely from considerations of federalism—comity—and the importance of tax to state government.

The Court cited the crucial role taxation plays in the very existence of the sovereign States.

> "It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible."

Fair Assessment, 454 U.S. at 102, (quoting *Dows v. Chicago*, 78 U.S. (11 Wall.) 108, 110 (1871).) It went on to note the long history of "reluctance to interfere by prevention with the fiscal operations of the state governments caus[ing] it to refrain from so doing in all cases where the Federal rights of the persons could otherwise be preserved unimpaired." *Fair Assessment*, 454 U.S. at 109, (citing *Boise Artesian*, 213 U.S. at 282.) It then quoted extensively from several other cases to demonstrate the vitality of the comity principle both before and

after the enactment of the Tax Injunction Act.[4] Finally, the Court concluded that damages actions are no less disruptive of state tax systems than injunctions or declaratory judgments, noting that "[t]axpayers such as petitioners would be able to invoke federal judgments without first permitting the State to rectify any alleged impropriety." 454 U.S. at 114. In no area other than state taxation has federal court jurisdiction over § 1983 actions been subjected to an exhaustion-of-state-remedies requirement by judicial fiat.

The four concurring Justices in *Fair Assessment* took a slightly different approach, but reached the same conclusion that state tax procedures should not be displaced by federal court action, even where the state tax is challenged on constitutional grounds. Justice Brennan cited and relied upon the holding in

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[4] "The statute 'has its roots in equity practice, in principles of federalism and in recognition of the imperative need of a State to administer its own fiscal operations.' *Tully v. Griffin, Inc.*, 429 U.S. [68] at 73 [(1976)]. This last consideration was the principal motivating force behind the Act: this legislation was first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes. 81 Cong.Rec. 1415 (1937) (remarks of Sen. Bone) ...." *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 522, 101 S.Ct. 1221, 1234, 76 L.Ed.2d 464 (1981).

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"'The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it.' *Id.*[*Great Lakes Dredge & Dock Co. v. Huffman*], at 298, 63 S.Ct. at 1073 (quoting *Matthews v. Rodgers*, 284 U.S. at 525, 52 S.Ct. at 219)."

Fair Assessment, 454 U.S. at 110, 111.

First National Bank of Greeley v. Board of Commissioners of Weld County, 264 U.S. 450 (1924) that "before a litigant complaining of alleged overassessment of taxes may bring a damages action grounded on the Constitution or statutes of the United States, that litigant must fully exhaust any administrative remedies afforded by the State." 454 U.S. at 133.

The same deference for state tax administrative procedures invoked in *Fair Assessment* should apply here, especially where the alleged infirmity in the assessment of tax is the State's interpretation of its own law. In *Fair Assessment*, this Court recognized that the comity afforded State governments appropriately stays a specific, congressionally-mandated cause of action challenging the constitutionality of a state tax. How much more clear then that comity counsels restraint in invoking a judicially-created cause of action concerning the correct interpretation of state tax law.

This deference is particularly appropriate when the judicially-created cause of action has become obsolete with regard to state taxation. Actions for *indebitatus assumpsit* were first applied to tax matters to fill a gap because statutory tax procedures failed to provide a remedy for illegal taxation. That gap has long since been filled by plain, speedy and adequate state tax procedures.

D. The Doctrine of Federal Court Abstention also Counsels Deference to State Tax Procedures where, as here, Vital State Interests are Involved, there is an Adequate State Law Remedy, and the Issue is One of State Law.

The doctrine of federal court abstention, an extension of comity, is invoked when the state interests are "vital" and "important." *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 11

(1987) (vital state interest in the entry of state court judgment); *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 434 (1982) (state bar disciplinary hearings); *Moore v. Sims*, 442 U.S. 415, 423-424 (1979) (state child abuse proceedings); *Trainor v. Hernandez*, 431 U.S. 434, 441 (1977) (state writ of attachment); *Juidice v. Vail*, 430 U.S. 327 (1977) (state contempt process); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 603-605 (1975) (public nuisance statute); *Younger v. Harris*, 401 U.S. 37 (1971) (criminal statute). As discussed above, there is perhaps no more vital state interest than the ability of the States to collect taxes. The abstention doctrine focuses on the availability of a state forum and the possibility that the matter can be resolved by the interpretation of state law.

In *Juidice v. Vail*, the Court found abstention appropriate where, as here, state court proceedings provided the plaintiff with the opportunity to resolve his claim. The Court cited the emphasis in *Huffman* that the core of the *Younger* doctrine of nonintervention was

> "'the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.'"

430 U.S. at 334 (quoting *Huffman*, 420 U.S. at 601, quoting *Younger*, 401 U.S. at 44). In discussing whether abstention may be required even when the defendant has not availed himself of the opportunity for a hearing in the state court proceedings, the Court noted that it was simply the *availability*

of the opportunity that was significant. 430 U.S. at 337.[5] The case at bar is very similar to *Juidice v. Vail* in that WBEC was engaged in state court litigation about the very refund at issue here. It was only the dismissal directed by the Government that prevented *all* issues from being resolved in state court.

Of primary importance to the abstention doctrine has been the question of whether state law is likely to be determinative. If the matter at issue may be decided through interpretation of state law, abstention is appropriate. *Pennzoil Co. v. Texaco*, Inc., 481 U.S. at 11-12; *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236 (1984); *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 477 (1977). Here, the *only* issue is state law—the correct application of state tax law to WBEC's activites. No constitutional question needs resolution by the federal court.

Thus this case is unlike *United States v. Anderson County, Tennessee*, 705 F.2d 184 (6th Cir. 1983), cited by the United States (Br. 22), where the issue of taxing a federal contractor was constitutional, based on interpreting the contract, not the application of state law. Similarly, *United States v. Bureau of Revenue of the State of New Mexico*, 291 F.2d 677 (10 Cir. 1961) is distinguishable. There, the court held that the United States was not barred by the Tax Injunction Act from obtaining an injunction against the unconstitutional assessment of a state tax. In rejecting the doctrine of abstention the court noted that

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[5] As the Court put it in language particularly pertinent to the case at hand:

> Here it is abundantly clear that appellees had an *opportunity* to present their federal claims in the state proceedings. [footnote omitted] No more is required to invoke *Younger* abstention.

Id., (emphasis in original).

this was not a case where "the state statute was fairly open to interpretation that would moot the constitutional question or even change the nature of the problem." *Id.* at 679. Under circumstances where the issues can be resolved by application of state law, as here, the Tenth Circuit commented that abstention "would be warranted and perhaps even required." *Id.*

E. The Intergovernmental Immunity Doctrine, Rooted in Fundamental Notions of Federal and State Sovereignty, Bars Discriminatory Tax Treatment by Federal and State Governments.

The intergovernmental immunity doctrine derived from the Supremacy Clause bars States from discriminating against federal contractors and the Federal Government from discriminating against state contractors. The doctrine and the principles that underlie it protect the States from being required to treat federal contractors *more* favorably, as proposed by the Government here, by allowing a federal contractor to obtain a refund long after the statute of limitations has run for state contractors and all other taxpayer.

It has long been the rule that States may tax federal contractors, but only if they do not discriminate against them—that is, treat them no worse than they treat other taxpayers. *James v. Dravo Contracting Company*, 302 U.S. 134, 149 (1937). Recent decisions of this Court have reemphasized this nondiscriminatory requirement. *See Davis v. Michigan, supra*; *South Carolina v. Baker*, 485 U.S. 505, 525, n. 15, (1988).

Reciprocal protection from discriminatory taxation of state contractors and employees by the federal government has been judicially implied from the States' role in the constitutional scheme. *Id.*; *Massachusetts v. United States*, 435 U.S. 444, 455-460 (1978); *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 484-485 (1939); *Collector v. Day*, 78 U.S. (11 Wall.) 113, 125-126 (1871). This reciprocal protection is "to protect the States from undue interference with their traditional governmental functions." *Massachusetts v. United States*, 435 U.S. at 459.

Such protection from discriminatory taxation—constitutionally-based for federal contractors and judicially-implied for state contractors—must also inform the extent to which this Court applies federal common law to require States to discriminate in favor of federal contractors and against state contractors by granting federal contractors *greater* rights than offered other taxpayers.[6] The Supremacy Clause and the reciprocal protection afforded States by the very nature of the federal system ought to bar judicially-created federal common law actions from requiring States to allow federal contractors, and the Federal Government through them, to gain refunds at times and in manners not permitted to other taxpayers.

III. CASES MANDATING DISPLACEMENT OF STATE LAW BY FEDERAL COMMON LAW UNDER THE *CLEARFIELD TRUST* DOCTRINE DO NOT APPLY WHERE, AS HERE, ONLY THE CORRECT APPLICATION OF STATE TAX LAW IS AT ISSUE.

An analysis of the juridical basis for displacing state law with so-called federal common law (what Justice Scalia recently described as pre-emption without congressional action, *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988)) reveals

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[6] Although here it is the United States suing under a cause of action for money had and received, there is no reason to suggest that federal contractors will not also sue on that basis. In fact, one already has. *Kelly-Ryan, Inc. v. State of Nevada*, (1st Jud. Dist. Carson City, No. 91-02091A).

that displacement of state law is not appropriate here. In spite of Justice Brandeis' sweeping language in *Erie R.Co. v. Tompkins*, 304 U.S. 64, 78 (1937), that "[t]here is no general federal common law," this Court has over the years used federal common law to judicially pre-empt state law in matters of crucial federal interest where state law conflicted with that interest. *See Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-367 (1943).[7]

> [A] few areas, involving 'uniquely federal interests,' [citations omitted] are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called 'federal common law.'

Boyle, 487 U.S. at 504. This judicially-ordained pre-emption, however, is the very rare exception. State laws

> should be overridden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied.

United States v. Yazell, 382 U.S. 341, 352 (1966).

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[7] *See also Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426-427 (1964) (international relations); *Howard v. Lyons*, 360 U.S. 593, 597 (1959) (liability of federal officers for defamation); *National Metropolitan Bank v. United States*, 323 U.S. 454, 456 (1945) (liability of the United States on commercial paper it issues).

Under the *Clearfield Trust* doctrine, the displacement of state law by the federal common law will occur only where (1) the topic in question raises uniquely federal interests and (2) a significant conflict exists between an identifiable federal interest and the operation of state law. *Boyle*, 487 U.S. at 504, 507; *United States v. Kimbell Foods, Inc.*, 440 U.S. 714, 726-729 (1979); *United States v. Little Lake Misere Land Company, Inc.*, 412 U.S. 580, 592-596 (1973); *Clearfield Trust*, 318 U.S. at 366-367. This case involves neither of those circumstances. At issue here is the application, or misapplication, of state tax law to a federal contractor. The matter rests exclusively on state law and does not intrude on federal sovereignty interest.

This Court has repeatedly ruled that state taxation of federal contractors does not concern "uniquely federal interests" and does not infringe on federal sovereignty, even where the economic burden of the tax is passed on to the Government. *United States v. New Mexico*; *Alabama v. King & Boozer*, 314 U.S. 1, 8 (1941). As the Court has interpreted the Supremacy Clause to allow States to *tax* federal contractors, it follows that States should be allowed to require federal contractors (and those in privity with them) to follow concededly plain, speedy and efficient remedies to obtain tax refunds where state law was allegedly misapplied. Application of state law would not frustrate specific objectives of any federal program. *Kimbell Foods*, 440 U.S. at 729. There is no need for uniformity in administering federal contracts such as would require that federal law be substituted for state tax procedures in determining whether the state tax was properly interpreted in assessing the federal contractor. State tax procedures do not constitute the kind of "specific aberrant or hostile state rules" that would make their adoption here inappropriate. *Little Lake Misere Land Co.*, 412 U.S. 595-596. The only apparent federal interest the Government can truthfully find here requiring the adoption of federal law is forum shopping. (The Government

did not need the six-year statute of limitation provided by federal law in 28 U.S.C. § 2415. Its contractor had already timely filed refund litigation in California state court.)

The Government in its brief repeatedly cites *Board of Com'rs of Jackson County, Kansas v. United States*, 308 U.S. 343, 350-351 (1939), as a case where state tax law was displaced under the *Clearfield Trust* doctrine. In fact, the Court there did not displace state law. At issue was whether Jackson County was required to add interest to a refund of taxes that had been erroneously paid by an Indian. Although the Court asserted in dictum that state procedures cannot block remedies available to the Government on behalf of an Indian—which language the Government cites in its brief with emphasis and assurance—the Court ultimately looked to *state* law to determine if interest was owed. Significantly, the Court noted in language particularly pertinent to the case at hand, that

> [i]n the absence of explicit legislative policy cutting across state interests, we draw upon a general principle that the beneficiaries of federal rights are not to have a privileged position over other aggrieved tax-payers in their relation with the states or their political subdivisions.

308 U.S. at 352. And yet, the Federal Government would propose just such a privileged position for its contractor here.

A number of cases concerning the propriety of displacement of state law by federal common law have revolved around federal contracts. There is substantial authority that federal common law governs litigation where the "obligations to and rights of the Unites States under its contracts" are at issue. *See Little Lake Misere Land Co.*, 412 U.S. at 592-594. Where the Government's rights under the contract are not at issue,

however—where, as here, the litigation concerns a conflict between the federal contractor and a third party—state law has not been displaced. *Miree v. DeKalb County*, 433 U.S. 25 (1977); *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63 (1966); and *Bank of America Nat. Trust & Sav. Ass'n v. Parnell*, 352 U.S. 29 (1956). In each of those cases, the dispute focused on the rights or obligations of federal contractors with third parties, not with the United States. In each, the Court ruled that the litigation did not directly affect the United States and state law controlled.[8]

Here, because of WBEC's obligation to repay any refund to the federal Department of Energy, one might argue that this litigation does directly affect the Government. At first blush, such direct affect on the Government would seem to distinguish this case from *Miree*, *Wallis* and *Parnell*. But a comparison of the recent *Boyle* decision, which found added cost to the Government determinative, with this Court's consistent affirmation of the propriety under sovereign immunity of imposing state tax on federal contractors, even where passed on to the

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[8] In *Miree*, plaintiffs sued as third party beneficiaries to a contract between the Government (through the FAA) and the county to recover for injuries sustained as the result of an airplane crash allegedly caused by the placement of a garbage dump too close to the airport in violation of the contract to restrict land use adjacent to the airport. Although resolution of the case involved interpretation of the federal contract, state law was not displaced by federal law. 433 U.S. at 33. *Wallis* concerned a federal mineral lease to a private party and the relationship between the federal lessee and other parties who alleged that they had acquired an assignment of the lease. Even though federal statute authorized assignments of these leases and imposed certain restrictions on them, state law controlled the litigation between the lessee and alleged assignees. 384 U.S. at 69-72. *Parnell* involved commercial paper issued by the United States. At issue was whether the victim of the theft of bonds could recover the money paid to Parnell who cashed them. Even though *Clearfield Trust* had made clear that federal law controls the Government's duty to pay on the bonds, obligations of the payee vis-à-vis third parties were determined by state law. 352 U.S. at 33-34.

Government, shows that such "direct impact" provides no basis for applying federal law to an action for refund of state tax paid by a contractor.

In *Boyle* a five-Justice majority barred recovery by the family of a U.S. Marine killed in a helicopter crash allegedly because of a manufacturer's design flaw. It established the so-called "federal contractor defense" as a judicially-conceived element of federal common law. State law conflicted because it provided for contractor liability. The Court determined that the interest of the United States would be directly affected, if state law permitted liability, because the contractor would pass on to the Government the cost any such potential liability would add to contracts.

> The imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price.
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> * * *
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> The financial burden of judgments against the contractor would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices to cover, or to insure against, contingent liability for Government-ordered designs.

487 U.S. at 507, 511-512.

In the area of state taxation, however, this Court has reached the exact opposite conclusion from that it reached in *Boyle* with regard to the significance of passing on liability from a federal contractor to the Government. Even though the

Federal Government will ultimately bear the economic burden of state taxation imposed on the receipts of federal contractors, federal sovereignty interests do not bar the imposition of the state tax. *United States v. New Mexico*, 455 U.S. at 735.*

This distinction between the Federal Government, its agents and instrumentalities on the one hand and federal contractors on the other has been more sharply drawn in the area of state taxation than in any other area. While in other areas *Boyle* might suggest that a direct economic impact on the Government is sufficient to implicate federal sovereignty and permit application of federal common law, such impact is permissible in the area of state taxation because of the importance of financially viable state governments in the federal system. State law can control a contractor's state tax liability without damage to federal sovereignty interests.

The Government would have the Court believe the Ninth Circuit's decision below is out of step with other Circuits. Rather it is the Government's proposal to extend federal common law to disrupt state tax procedures applied to federal contractors that would upset the balance of federalism established by this Court's precedents.

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* The Court in *United States v. New Mexico* was clear that any expansion of contractor immunity must come from Congress, not the Court.

> If the immunity of federal contractors is to be expanded beyond its narrow constitutional limits, it is Congress that must take responsibility for the decision, by so expressly providing as respects to contracts in a particular form or contracts under particular programs.

455 U.S. at 737.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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